

Service Date: February 1, 2000

DEPARTMENT OF PUBLIC SERVICE REGULATION  
BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MONTANA

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IN THE MATTER OF the	)	UTILITY DIVISION
Implementation of 47 C.F.R. § 51.507(f),	)	
Establishing Different Rates for Network Elements	)	DOCKET NO. D99.12.277
in Different Geographic Areas Within the State	)	ORDER NO. 6227

IN THE MATTER OF The Petition of	)	UTILITY DIVISION
AT&T Communications of the Mountain	)	
States, Inc. Pursuant to 47 U.S.C. Section	)	DOCKET NO. D96.11.200
252(b) for Arbitration of Rates, Terms,	)	ORDER NO. 5961h
and Conditions of Interconnection With	)	
U S WEST Communications, Inc.	)	

**AMENDED NOTICE DIRECTING FILINGS,**  
**AMENDED NOTICE OF PARTY STATUS,**  
**AND PROCEDURAL ORDER**

Introduction and Background

On December 21, 1999 the Montana Public Service Commission (Commission) issued Notice Directing Filings, Notice of Party Status, Notice of Opportunity to Intervene and Proposed Procedural Schedule (Notice) in Docket No. D99.12.277. In that Notice U S WEST Communications, Inc. (U S West) was directed to make two filings, explained in more detail in the Notice: 1) "a filing that will allow the Commission to comply with 47 C.F.R. § 51.507(f) while remaining consistent with § 69-3-848(3), MCA."; and 2) "a filing that deaverages network element prices contained in any interconnection agreement that is covered by § 69-3-848(3)4), MCA." The Commission established January 31, 2000 as the deadline for the filings, and it asked for comments on a proposed procedural schedule by January 4, 2000.

After receiving a one day extension U S West filed comments on January 5, 2000. U S West's comments, however, were not directed at the proposed procedural schedule; rather, they were directed at substantive and legal issues that U S West perceives in the Commission's

December 21, 1999 Notice. Because U S West's comments went beyond what was contemplated in the Notice, the Commission gave an opportunity to respond to the comments in the Notice of Opportunity to Respond, January 14, 2000. Montana Wireless, Inc. (Montana Wireless) and AT&T Communications of the Mountain States, Inc. (AT&T) filed response comments. On January 26, 2000, at a regularly scheduled work session, the Commission reconsidered its December 21, 1999 Notice, in light of all the comments, and made decisions and gave direction as described below.

### Discussion and Decision

U S West makes two arguments in its comments: 1) the Commission's December 21, 1999 Notice in Docket No. D99.12.277 should apply to all incumbent LECs in Montana, not just U S West; 2) adjudication of wholesale interconnection rates in the U S West/AT&T interconnection agreement cannot include parties other than U S West, AT&T and the Montana Consumer Counsel.

Montana Wireless responds that Docket No. D99.12.277 applies only to U S West because U S West is the only non-rural carrier in Montana. Montana Wireless argues that it and other companies have a due process right to participate in a process that considers U S West's wholesale prices for unbundled network elements for AT&T because U S West requires Montana Wireless to take the prices established for AT&T. In addition, Montana Wireless urges the Commission to require U S West to include in its filing "necessary information for the deployment of high frequency line sharing as an additional unbundled network element available under existing interconnection agreements."

AT&T argues that § 69-3-848(3), MCA, is preempted by federal law. According to AT&T, the only way 47 C.F.R. § 51.507(f) and § 69-3-848(3), MCA, can be harmonized is if retail prices are deaveraged by May 1, 2000. Failing that, AT&T contends that state law must give way and all network elements must be deaveraged by May 1, 2000.

The Commission finds in response to the comments as follows: First, the Commission assumes, based on 47 U.S.C. § 153(a)(47), that U S West is the only non-rural telephone company in Montana. (If that is not the case, the Commission will extend the requirements of

Docket No. D99.12.277 to other non-rural companies.) 47 C.F.R. § 51.507(f) addresses rates for network elements which must be provided pursuant to 47 U.S.C. § 251(c)(3). Rural ILECs, however (every ILEC in Montana save for U S West), are exempt from 47 U.S.C. § 251(c)(3). 47 U.S.C. § 251(f)(1). Therefore, until rural exemptions are lifted, federal pricing rules for network elements apply only to U S West in Montana.

Second, U S West is correct that the only parties to a proceeding that deaverages network element prices in the U S West/AT&T interconnection agreement should be U S West, AT&T and the Montana Consumer Counsel. These were the parties to the arbitration proceeding, and deaveraging network element prices in the U S West/AT&T interconnection agreement is an extension of that proceeding.<sup>1</sup> The fact that Montana Wireless, or any other company, signed an agreement with U S West stating that AT&T rates will be used, does not create a right to participate in a subsequent proceeding that considers those rates.

Third, regarding AT&T's comments, the Commission will not consider Montana law preempted unless a proper court so determines, or there is absolutely no good faith argument to support Montana law. The Commission agrees with AT&T that the only way to completely remove the preemption issue would be to deaverage retail prices to end users by May 1, 2000. That, however, is not realistic. Therefore, the Commission will continue as indicated in its

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<sup>1</sup> Docket No. D96.11.200 was assigned to the Commission's arbitration of the U S West/AT&T interconnection agreement. Pricing for unbundled network elements was an issue in the arbitration, but the Commission concluded that the issue was too complex to establish permanent rates in that proceeding. "We conclude that it is appropriate to establish interim rates to the greatest degree of accuracy possible. We will establish permanent rates in a separate generic U S West costing and pricing docket where the parties can focus on costing and pricing issues and related policy matters." Docket No. D96.11.200, Order No. 5961b, pp. 81-82. With respect to deaveraging rates the Commission wrote, ". . . we will not deaverage rates for unbundled network elements at this time. The FCC's geographic deaveraging requirements have been stayed by the 8th Circuit and we need not follow them. . . . Geographic deaveraging of network elements should be included as an issue in the generic U S West costing and pricing proceeding." *Id.* at 83. The geographic deaveraging rules of the FCC have been upheld by the United States Supreme Court in AT&T v. Iowa Utilities Board, 525 U.S. 366. Therefore, the Commission must address deaveraging, even though it is still too early to initiate a generic U S West costing and pricing docket.

December 21, 1999 Notice; given that retail prices to end users have for the most part not been deaveraged in Montana, the Commission will comply with 47 C.F.R. § 51.507(f), as far as possible, consistent with § 69-3-848.

Fourth, the Commission will not include "line sharing" in Docket D99.12.277. The Commission will open another docket to address "line sharing."

#### Direction

The Commission modifies its December 21, 1999 Notice as follows: 1) U S West's filing to allow the Commission to comply with 47 C.F.R. § 51.507(f), while remaining consistent with § 69-3-848(3), MCA, will retain Docket No. D99.12.277. Persons party to Docket No. D98.8.192, or who requested intervention by January 17, 2000 pursuant to the Notice, are parties to Docket No. D99.12.277. 2) U S West's filing to deaverage network element prices contained in any interconnection agreement that is covered by § 69-3-848(4), MCA, will be given Docket No. D96.11.200, the U S West/AT&T arbitration docket. If there are other interconnection agreements covered by § 69-3-848(4), the Commission will assign separate docket numbers to those agreements. The parties to Docket No. D96.11.200 are and will remain U S West, AT&T and the Montana Consumer Counsel. 3) The Commission will issue here a procedural order that will control both Docket Nos. D96.11.200 and D99.12.277. Parties should identify all documents with the appropriate docket number.

#### Procedural Order

The Commission issues the following Procedural Order in Docket Nos. D96.11.200 and D99.12.277.

#### Intervention

1. In this order the term "parties" includes: 1) for Docket No. D96.11.200: U S West, AT&T, Montana Consumer Counsel; 2) for Docket No. D99.12.277: Montana Consumer Counsel, Telecommunication Resellers Association, AT&T, Ronan Telephone Company, Montana Communications, Touch America, Western CLEC, Montana Telecommunications

Association, Skyland Technologies, Inc., Montana Wireless, and New Edge Network, Inc. dba New Edge Networks.

Service and Filing

2. Copies of all pleadings, motions, discovery requests and responses, prefiled testimony, briefs and all other documents shall be filed with the Commission and served on all parties and other entities and individuals on the attached service list for the respective dockets. Service upon the parties shall be upon the parties' attorney of record and such other individuals as may be reasonably designated by the attorney of record. The parties may limit service of discovery responses to service on the party making the discovery request, the PSC, and parties specifically requesting service of discovery responses.

3. Except for objections to discovery, and responses to objections to discovery, discussed below, filing by means of telephonic facsimile will not suffice for timely filing. Filing and service deadlines are the dates set for filing of the requisite number of paper copies in the offices of the Commission. Parties may arrange among themselves for use of fax or express mail.

4. An original and nine (9) copies of all discovery and other documents, except proprietary documents, must be filed with the PSC. Only one copy of proprietary documents shall be filed -- on yellow paper.

Schedule

5. The deadlines for service and filing of documents in these Dockets (pursuant to the above requirements) and other pertinent dates, shall be those dates contained in Attachment □A□ which is attached hereto and incorporated herein by this reference.

Discovery

6. The term "discovery" includes all forms of discovery authorized by the Montana Rules of Civil Procedure, as well as □data requests□ (informal interrogatories).

7. The Commission directs all parties to prepare data requests according to the following guidelines:

a. Parties must assign their data requests a request number (e.g., Ronan-001). Request numbers must be consecutive regardless of the party to whom the request is directed (e.g., the PSC might direct PSC-001 through -008 to Ronan, PSC-009 through -016 to MCC, and PSC-017 through 019 to Montana Wireless).

b. All data requests must include at the beginning of each request a description of five words or less explaining the subject of the data request. Other identifying information, such as the witness to whom the request is submitted, exhibit number, page number, etc., may be included in addition to, but not in lieu of, the subject of the request. This requirement will help to identify all data requests and responses addressing a particular subject or group of subjects. Subject descriptions will obviously vary from one party to another. However, each party should attempt to keep descriptions consistent from one request to another.

c. Multi-part requests may be used, each part denoted by a lower case letter (a, b, c, d and e). Requests must be limited to five parts (a-e), without any sub-parts. If additional parts are necessary, additional requests should be made. A single part request should be denoted by the request number only.

d. Examples of acceptable data requests are as follows:

PSC-500 RE: Purchased Gas Contracts  
Witness - Burke, Page JBB-4, Lines 13-15.

Please provide the origination and expiration date for each contract.

PSC-501 RE: Bypass  
Witness - Johnson, Page DAJ-14, Lines 11-14.

- a. What risks of bypass would be avoided by the shareholders as a result of the Company's proposed treatment?
- b. What risks of bypass would be avoided by the ratepayers as a result of the Company's proposed treatment?

8. The party receiving the written discovery or data request has three business days from receipt to file any objections it has to the request(s). Responses to objections may be made

within two business days of the objections. Objections and responses shall be served by facsimile transmission (fax) or hand delivery upon the Commission and all parties, followed by mail delivery postmarked within the three business days. Parties shall notify each other and the Commission by phone (leaving a message is acceptable) of the imminent arrival of objections and responses by fax. The Commission will dispose of objections by prompt ruling or may schedule argument. Failure to timely object constitutes a waiver of objections.

9. Any requesting party dissatisfied with the response to any written discovery or data request and desiring PSC action to compel, must serve its written objection(s) by fax within three business days after receipt of such response. Responses to objections may be made within three business days of the objections. Service and notice must be as indicated in paragraph 9. The PSC will dispose of such objection(s) by prompt ruling, or may schedule argument. The PSC will act either to sustain or overrule the objection(s), and, if sustaining, set a deadline for a satisfactory response.

10. The timelines for objections and resolving objections are obviously tight. Therefore, it is imperative that parties attempt to resolve all discovery disputes between themselves, before filing objections. All motions regarding discovery should contain a statement explaining the efforts taken to resolve the issue informally, and a photocopy or restatement of any requests and responses.

11. Submission of written discovery after the deadline established will be allowed by leave of the PSC only. The PSC will not grant requests without a showing of good cause explaining why the request was not submitted within the time period allowed.

12. Unless excused by the PSC, failure by a party to answer data requests or other discovery from any party may result in: (a) action refusing to allow the failing party to support or oppose related claims; (b) action prohibiting introduction of related matters in evidence; (c) action striking pleadings, testimony or parts thereof; (d) action staying further proceedings until the request is satisfied; or (e) action dismissing the case, defense, proceeding or parts thereof.

13. Unless otherwise provided by this Order, PSC Rules or other PSC action, discovery procedures and requirements shall be governed by the applicable Montana Rules of Civil Procedure. *See* ARM 38.2.3301 through 38.2.3305.

Testimony and Evidence

14. The PSC contemplates a complete identification of issues before the hearing. The PSC will closely scrutinize new issues or data in new areas introduced at the time of hearing, and may disallow the issues or information unless reasonably related to issues earlier identified in the application, prefiled testimony, or proceedings.

15. At hearing, the PSC will admit into the record all prefiled direct and answer testimony upon motion of the proponent, without the necessity of the witness reading the testimony into the record. This testimony will be an exhibit and not otherwise entered into the transcript.

16. All proposed exhibits and prefiled written testimony shall be marked for the purpose of identification prior to the start of the hearing. Parties shall arrange in advance with the court reporter or at a prehearing conference, for the preferred manner of identifying exhibits.

17. When cross-examination is based on a document not previously filed with the Commission, copies of the document will be made available to the Commissioners, parties, and staff, unless good cause is shown why copies are not available. Parties introducing data requests or other discovery must have copies of each request and response available at the hearing for the court reporter. Copies of data responses to be introduced into the record do not have to be made available at the hearing for Commissioners, Commission staff and other parties, except when there is an objection to introduction indicated in the prehearing memorandum.

18. Parties may be permitted to present live rebuttal testimony only by leave of the PSC or presiding officer.

19. The Montana Rules of Evidence in effect at the time of the hearing will apply.

20. Any party to this proceeding responding to written discovery from any other party or the PSC shall have each person authorizing any response(s) present and available as a witness at the hearing to introduce the response(s) and be available for cross-examination. Parties may



waive objection(s) to introduction absent the author, and the right to cross-examine. Upon PSC approval of such parties' agreement to waiver, the person responding to data requests need not be present to testify and the responses may be introduced into the record. Written discovery and data responses will be introduced at hearing only pursuant to applicable rules of evidence and through an appropriate witness subject to cross-examination, or upon stipulation approved by the PSC (except, *see* Rule 32, M.R.Civ.P. regarding admission of depositions).

#### Prehearing Motions and Conferences

21. Motions by any party, including motions to strike prefiled testimony and motions concerning any procedural matter connected with this Docket shall be raised at the earliest possible time. Prehearing motions shall be submitted on briefs, without oral argument, unless otherwise requested by a party and approved by the PSC. All parties are strongly encouraged to attempt to resolve procedural disputes informally.

22. The PSC may set prehearing conferences to discuss settlement of any issues in the proceeding, simplification of issues, possibility of obtaining admissions of fact and documents, distribution and marking of written testimony and exhibits prior to the hearing, and other procedural matters as may aid in the disposition of the proceeding.

#### Prehearing Memoranda

23. Each party and the Commission staff will serve a prehearing memorandum on the Commission and all formal parties in this Docket on or before March 15, 2000, containing the following information:

- a. Each and every Data Response and all other exhibits that it intends to offer into evidence at the hearing;
- b. The name of the witness responsible for the Data Response or through which the exhibit will be offered; and
- c. The issue to which the Data Response or document is relevant.

In addition, all parties (but not the Commission staff) are required to include the following in their prehearing memoranda:

- d. Witnesses the party will call to testify;

- e. A proposed order of witnesses (including whether each witness would simultaneously offer both direct and rebuttal testimony);
- f. A proposed order of cross-examination; and
- g. Identification and explanation of any special scheduling or witness sequence needs which a party requests to accommodate scheduling conflicts.

Amendment

24. The provisions of this Order may only be amended by PSC action, or PSC staff action pursuant to delegated authority. The PSC shall maintain continuing jurisdiction of the matters encompassed by this Order during the course of this Docket.

DONE AND DATED this 31st day of January, 2000, by delegation to Commission staff as the Order of the Montana Public Service Commission.

BY THE MONTANA PUBLIC SERVICE COMMISSION

DAVE FISHER, Chairman  
NANCY MCCAFFREE, Vice Chair  
BOB ANDERSON, Commissioner  
GARY FELAND, Commissioner  
BOB ROWE, Commissioner

ATTACHMENT □A□

**Procedural Schedule**

Docket No. D96.11.200, Order No. 5961h  
Docket No. D99.12.277, Order No. 6227

<u>Deadline*</u>	<u>Action</u>
January 31, 2000 --	U S West Filings
February 10, 2000 –	Discovery on U S West
February 24, 2000 –	Answers to Discovery
March 13, 2000 --	Intervenor Testimony
March 20, 2000 --	Discovery on Intervenor Testimony
March 31, 2000 –	Answers to Discovery
April 10, 2000 –	Rebuttal Testimony
April 14, 2000 –	Prehearing Memoranda
April 20, 2000 –	Hearing (Tentative)